



December 8, 2016

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of Ex Parte Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On December 6, 2016, I, along with Dan Edelman and Julie Clark of the Chicago law firm of Edelman, Combs, Lattuner & Goodwin, LLC, met with Kurt Schroeder, Nancy Stevenson and Nellie Foosner of the Consumer and Governmental Affairs Bureau staff of the FCC. Additionally, I discussed the same issues on December 8, 2016 with Mark Stone, also of the Bureau.

Mr. Edelman and Ms. Clark discussed the issues related to 1) their pending Application for Review of the retroactive waiver issued November 2, 2016 for North American Bancard, LLC., CG Docket Nos. 02-278, 05-338 (filed August. 16, 2016), and 2) the pending Petition for Declaratory Relief and Waiver, filed by Kohll's Pharmacy and Homecare Inc.'s Petition for Declaratory Relief and Waiver. The ex parte letter filed today by Ms. Clark will address these matters.

I spoke with staff about the overarching procedural problems caused by these retroactive waivers. While we do not agree that it is either legal or proper for the Bureau, or the Commission, to issue these retroactive waivers, we discussed some specific procedural improvements that would provide more transparency and fairness to the process, if these waivers continue to be considered. In particular, we will be asking the Commission to consider a set of procedural requirements that would include 1) a requirement that all parties to pending litigation which is the subject of a waiver petition be notified simultaneously by the petitioner of filing of the petition; 2) the application of time limits on the filing of petitions based on the initiation of the litigation to ensure that petitions are not permitted to be filed so early in the pending litigation that the parties would not have had time to conduct discovery relevant to the issues in the petition for a waiver; and 3) a requirement that parties who provide evidence relevant to the petition should be required to do so only under penalties of perjury. We agreed that we will be providing a more fully developed proposal on these procedural issues early in 2017.

We also discussed the need for the Bureau to clarify the recent retroactive waivers granted on November 2, 2016¹ in relation to junk fax opt-out notices, and on October 14, 2016² on prior-express-written-consent rules for making telemarketing calls. In both Orders, the Bureau allowed a retroactive waiver of one of the requirements with which the petitioners had failed to comply, while stating that the callers (in the October order) and fax ad senders (in the November order) were still required to have obtained consent from the party to whom their transmission was aimed.

More specifically, in the October order relating to telemarketing calls, the Bureau stated:

We emphasize, however, that the waivers granted here only apply to calls for which some form of written consent had previously been obtained. Nothing in the Commission's 2015 decision suggested that parties could reasonably have been confused about the requirement that the consent in question had to be written, and the Commission was specific in that regard. We also note that the petitioners there specified that they were requesting clarification only about whether they could continue to rely on previously obtained written consent.³ (Emphasis added).

In the November order related to junk faxes, the Bureau stated:

We find that the 22 petitioners here have adequately demonstrated that they are similarly situated to the initial waiver recipients and warrant a limited retroactive waiver for fax ads sent with recipients' prior express consent or permission prior to April 30, 2015.⁴ (Emphasis added).

The problem is that petitioners are ignoring the clear—and essential—requirements to affirmatively demonstrate that they had consent to make the telemarketing calls or send the junk faxes. They are seeking to use the Bureau's grant of waivers of one requirement under the TCPA as a way to avoid any obligation to show the court that they actually had consent—thereby avoiding all liability in the pending class actions even for violation of requirements about which they have not even claimed to have been confused.

The Bureau should clarify what the Commission has already made clear: that in all cases challenging calls or faxes in violation of the TCPA, the caller or sender has the affirmative obligation to show that it had consent from the party who received the calls or faxes. This obligation has been reiterated several times by the Commission:

- [S]hould any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was

¹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of

² In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) regarding the Commission's Prior Express Written Consent Requirement, October 14, 2016, ("October Order") available at <https://ecfsapi.fcc.gov/file/1014266091571/DA-16-1179A1.pdf>.

³ October Order, para. 15.

⁴ November Order, para 13.

obtained.⁵

- Responsible callers, cognizant of their duty to ensure that they have sufficient consent under the TCPA, will likely maintain proper business records tracking consent. The veracity of such business records is a matter for triers of fact to decide.⁶
- The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent. Thus, we see no reason to shift the TCPA compliance burden onto consumers and affirm that they do not bear the burden of proving that a caller did not have prior express consent for a particular call.⁷

While we still object to the legality and the propriety of these waivers, at the least, the Bureau should clarify, for all retroactive waivers that it or the Commission has issued or may in the future issue, that although one aspect of the rules may have been waived, that waiver is contingent on the caller or sender proving that it had the requisite consent. Whether in a class action or an individual action, the caller or sender has the obligation to show that it had consent, and the Bureau should articulate that the waivers do not relieve these parties from their affirmative responsibilities to demonstrate this consent for every call or junk fax transmitted.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104). Thank you very much.

This disclosure is made pursuant to 47 C.F.R. §1.1206.

Sincerely,

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⁵ 2012 TCPA Order, 27 FCC Rcd at 1844, para. 33.

⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, Note 292 (2015), (“2015 TCPA Declaratory Ruling”), available at <https://ecfsapi.fcc.gov/file/60001114781.pdf>.

⁷ *Id.* para 292.